FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CANNELTON INDUSTRIES, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-381 A.C. No. 46-06051-03689 Stockton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CHARLES PATTERSON, Employed by Cannelton Industries, Inc., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-100 A.C. No. 46-06051-03698-A Stockton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. GEORGE RICHARDSON, Employed by Cannelton Industries, Inc., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-101 A.C. No. 46-06051-03697-A Stockton Mine

DECISION

Appearances: Tina C. Mullins, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Petitioner;
John T. Bonham, II, Esq., (David J. Hardy, Esq., on brief), Jackson & Kelly, Charleston, West Virginia, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Cannelton Industries, Inc., Charles Patterson and George Richardson pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. The petitions allege that the company violated section 75.400 of the Secretary=s mandatory health and safety standards, 30 C.F.R. ' 75.400, and that Messrs. Patterson and Richardson, as agents of the company, knowingly authorized, ordered or carried out the violation. The Secretary seeks penalties of $3,600.00 against the company and $2,000.00 each for Patterson and Richardson. For the reasons set forth below, I find that Cannelton violated the regulation, that the agents knowingly authorized the violation and I assess penalties of $3,600.00 against the company and $500.00 each against Patterson and Richardson.

A hearing was held on October 11 and 12, 1995, in Charleston, West Virginia. In addition, the parties filed post-hearing briefs in the cases.

CIRCUMSTANCES OF THE CITATION

On March 7, 1994, Coal Mine Inspector Michael S. Hess was conducting a quarterly inspection of Cannelton Industries Stockton Mine, Portals No. 1 and No. 130. While inspecting the No. 3 conveyor belt, Hess came upon a pile of coal approximately ten feet wide and ten feet long and four feet high in the area of the V-scrapper.[1] The top of the pile was flat because the belt

[1] The V-scrapper is a scrapper located on the bottom belt to

was in contact with it and leveling it off. The belt roller was also in the coal. Hess described the pile as being black in color, made up of small lumps of loose coal as well as coal dust, and being dry on top. He estimated that it consisted of eight to twelve tons of coal.

As a result of these observations, Hess issued Citation No. 4195028, pursuant to section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1). The citation alleges that the company violated section 75.400 of the Secretary=s regulations in that:

> Management showed a high degree of negligence by allowing loose dry coal to accumulate under the No. 3 belt conveyor to a point where the loose coal was in contact with the belt. The coal accumulation measured approximately 10 feet in width, 10 feet in length and 4 feet in height. This condition was reported in the pre-shift mine examination report since 2/15/94 on each shift with no corrective action taken. A fire hazard is present with a moving conveyor belt running in loose dry coal.

(Govt. Ex. 1.) A subsequent special investigation resulted in petitions for assessment of penalty being filed against Patterson and Richardson, under section 110(c) of the Act, 30 U.S.C. ' 820(c), for having knowingly authorized, ordered or carried out the violation.[2]

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remove coal or other material from the inside of the belt.

[2] Section 110(c) provides, in pertinent part: AWhenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same penalties . . . .@

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.400 is taken verbatim from section 304(a) of the Act, 30 U.S.C. ' 364(a), and requires that A[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.@

It is well settled that section 75.400 A>is violated when an accumulation of combustible materials exists.: *Old Ben Coal Co.*, 1 FMSHRC 1954, 1956 (December 1979); *see also Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). The Commission has further explained that a prohibited >accumulation: refers to a mass of combustible materials that could cause or propagate a fire or explosion. *Old Ben*, 2 FMSHRC at 2808.@ *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1229 (June 1994).

In this case, there is no dispute that an accumulation of coal, as described by Inspector Hess, existed in the area of the V-scrapper on the No. 3 belt. There is, however, a conflict as to how and when the accumulation occurred and the implications that arise from the answers to those questions. It is the Respondent:s position that the accumulation had happened shortly prior to the time the inspector was making his inspection and that, therefore, no violation had taken place. Contrarily, the Secretary argues that the accumulation had grown over a two week period. I conclude that a preponderance of the evidence supports the Secretary:s position.

Dwight Sciemaczko and Lee Tucker, both fire bosses, examined the No. 3 belt as part of their duties everyday during the two week period prior to the issuance of the citation. They testified that beginning on February 14 they observed an accumulation of coal under the No. 3 belt V-scrapper. They further testified that the accumulation grew in size daily so that several days before March 1 the belt and rollers were rubbing the top of the pile.

Sheldon Craft, a general laborer, examined the No. 3 belt on the evening shift of February 25. He testified that he observed a large accumulation at the V-scrapper that was flat on the top and was touching the belt and rollers.

Finally, Sciemaczko accompanied Inspector Hess on the inspection and was with him when Hess discovered the accumulation at the V-scrapper. Sciemaczko testified that the accumulation that Hess observed was the same one that he had watched growing since February 14.

Against this, the company presented the testimony of Respondent George Richardson, day shift foreman, Respondent Charles Patterson, evening shift foreman, and Mickey Elkins, midnight shift foreman. While admitting that at various times between February 14 and March 1 they had observed some accumulations at the V-scrapper, all denied seeing an accumulation growing over a two week period and all denied ever seeing an accumulation touching the belt and rollers during that period.

Elkins testified that he had walked the belt about three and one half hours before the citation was issued and although he observed a fairly large accumulation, it was not the size of the one found by Hess and it was not touching the belt or rollers. The three foremen theorized that the accumulation discovered by Hess was the result of a shuttle car hitting the spill board at the belt feeder which in turn knocked the belt out of alignment and caused most of the coal to fall directly onto the bottom belt where it remained until it was removed by the V-scrapper. They believed that this must have happened a short time before the inspector arrived.

I find that the accumulation developed over a two week period as described by Siemiaczko, Tucker and Craft. There is no evidence that any of them had any reason not to tell the truth. Nor was there any indication at the hearing that they were not credible.

On the other hand, Richardson and Patterson not only have the responsibility for defending the company, but face personal liability as well. Their self-serving statements are not persuasive when compared with the other evidence in the case. Furthermore, there is no evidence to corroborate their speculation.

No one testified that in fact a shuttle car hit the spill board that morning, that the belt was out of alignment, that coal was observed traveling from the feeder to the V-scrapper on the bottom belt or that the belt was re-aligned after the accumulation was discovered. In addition, Inspector Hess testified that if such an accident had occurred, coal would spill off of the belt between the feeder and the V-scrapper, since the bottom belt is not designed to carry coal. No one testified that such spillage occurred and Hess specifically testified that he did not observe any spillage along the belt. Finally, the insinuation that this was how the accumulation occurred was not made at the time that the citation was issued, when it could have

been investigated, but was raised after legal proceedings were started.

Having found that the accumulation occurred over a two week period, I find that it should have been cleaned up long before Inspector Hess arrived at the mine. Since it was not, I conclude that Cannelton violated section 75.400 of the regulations.

Significant and Substantial

The Inspector found this violation to be Asignificant and substantial.@ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As is frequently the case, the determination as to whether this violation was S&S revolves around the third *Mathies* criterion, whether there was a reasonable likelihood that the safety hazard caused by the violation would result in an injury. As to the first *Mathies* requirement, I have already found that Cannelton violated a mandatory safety standard. I also find that the second factor, that the violation contributed to a measure of danger to safety, has been met because a fire could result from the friction of the belt and the rollers rubbing in the coal and a fire started elsewhere could be propagated by the accumulation. However, the Respondent argues that the third element was not met because of the short time the accumulation had existed and

the fact that most of it was damp making it unlikely that a fire would result.

I find that there was a reasonable likelihood that a fire causing injury would result. I have already rejected the company=s assertion that the accumulation had just occurred. I also reject its argument that because the coal was damp it would not be reasonably likely to cause a fire. In the first place, Inspector Hess testified that the coal, at least on top of the pile, was dry to the touch. In the second place, even if the coal was damp beneath the surface, the Commission has consistently recognized that damp coal can dry out and ignite. *Utah Power & Light Co., Mining Division*, 12 FMSHRC 965, 969 (May 1990), *aff=d*, 951 F.2d 292 (10th Cir. 1991); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (August 1985). Cannelton=s argument fails to take into consideration the Arisks emanating from continued normal mining operations.@ *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1232 (June 1994).

Having found that there was a reasonable likelihood that a fire resulting in an injury would result, it necessarily follows that there was a reasonable likelihood that an injury resulting from a fire would be reasonably serious in nature, the fourth factor, would also result. Accordingly, I conclude that the violation was Asignificant and substantial.@

Unwarrantable Failure

The inspector found this violation to be the result of an Aunwarrantable failure@ on the company=s part. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). AUnwarrantable failure is characterized by such conduct as >reckless disregard,= >intentional misconduct,= >indifference= or a >serious lack of reasonable care.= [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991).@ *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The Commission has held that Athe extensiveness of the violation, the length of time that the violative condition has existed, the operator=s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance@ are factors to be

considered in determining whether an accumulation violation was caused by an unwarrantable failure to comply with the regulation. *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992). Applying these factors to this case, I conclude that the violation was caused by Cannelton=s unwarrantable failure to comply with section 75.400.

I have already found that the accumulation grew over a two week period. Siemiaczko first reported that the No. 3 belt scrapper was Adirty@ on February 14. (Govt. Ex. 9, p.2.) He testified that Adirty@ meant that there was a coal accumulation that needed to be cleaned up. For the next two weeks, until the March 1 violation, every belt examiner indicated in the *Preshift - Onshift and Daily Report* that there was a coal accumulation at the No. 3 belt V-scrapper. Richardson countersigned every one of the reports. Patterson signed nine of them.

In spite of this, neither Richardson nor Patterson made any effort to find out what the problem was or made any specific attempt to have it cleaned up. Incredibly, they testified that they viewed the area from time to time during the period and did not notice anything unusual. Elkins, on the other hand, stated that at one time he did observe a larger than normal pile, although not as large as described by Siemiaczko, Tucker and Craft, which he unsuccessfully tried to have cleaned up.

I conclude that an accumulation which grew in size for two weeks and which was reported on every preshift for that period, should have put the operator on notice that greater efforts to clean it up were necessary, even if the foremen did not see it. Instead, except for Elkins= abortive attempt, the operator made no effort to abate the condition.

I find that Cannelton=s conduct in this case amounted to more than ordinary negligence, that it is best described by the terms Anot justifiable,@ Ainexcusable@ or Aindifferent.@ *Wyoming Fuel Co.,* 16 FMSHRC at 1627; *Youghiogheny,* 9 FMSHRC at 2010. Accordingly, I conclude that the violation occurred as a result of the operator=s Aunwarrantable failure@ to comply with the regulation.

Section 110(c) Violations

The Secretary has alleged that Richardson and Patterson Aknowingly@ violated section 75.400 and are personally liable

under section 110(c) of the Act.[3] I find that Richardson and Patterson knowingly authorized the violation by not taking steps to have the accumulation cleaned up.

The Commission set out the test for determining whether a corporate agent has acted Aknowingly@ in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff=d*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: AIf a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.@ The Commission has further held, however, that to violate section 110(c), the corporate agent=s conduct must be Aaggravated,@ *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC at 1630; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC at 2003-04.

In *Prebhu Deshetty*, 16 FMSHRC 1046 (May 1994), the Commission found a general mine foreman personally liable under section 110(c) for a violation of section 75.400. In doing so, the Commission held that Deshetty had actual knowledge of the accumulation problem because he was familiar with the belt where the accumulations were found, he had reviewed and countersigned the belt examiners report which indicated that the belt was Adirty@ or Aneed[ed] cleaning@ for every shift from January 7 to January 15 and he understood that that language meant a violative or hazardous accumulation existed. *Id.* at 1050-51.

The Commission went on to hold that Deshetty had specific knowledge of combustible accumulation problems in the mine, from reviewing previous citations issued to the mine for accumulations and from an MSHA inspector warning him that the mine needed to Atake a closer look@ at the problem, which should have occasioned a greater awareness of the situation in him. *Id.* at 1051. The Commission stated: ADeshetty was aware of the ongoing spillage problem along the No. 1 beltline that ultimately resulted in the citation, but failed to take measures to remedy the problem. Such inaction by the responsible supervisor, placed on actual notice by MSHA of the problem, constituted a knowing authorization of the violation.@ *Id.*

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[3] *See* n.2, *supra*, for the relevant provisions of this section.

In this case, there is no evidence that either Richardson or Patterson had reviewed the violation history of the mine or that they had been specifically put on notice by MSHA that the mine had an accumulation problem. On the other hand, they clearly had actual knowledge of the accumulation problem. The specific location of the accumulation, the V-scrapper, was noted as being Adirty@ or Aneeds cleaned@ from February 14 to March 1. Both had countersigned the reports containing these entries and both testified that the entries meant that there was an accumulation that required attention. In addition, both testified that they had observed the V-scrapper, and while they did not admit to seeing the accumulation described by Sciemiaczko, Turner and Craft, they did admit to seeing some accumulation.

Their testimony implies that the numerous entries in the examiner=s book may not have referred to a continuing accumulation. However, since neither Richardson nor Patterson bothered to check the situation out, and since the evidence amply demonstrates that the accumulation was a continuing one, their Aself-induced ignorance@ will not absolve them from liability. *Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). Nor will their claim that they did not know whether the accumulation described in preshift book was a prohibited one. *Deshetty* at 1051; *Warren Steen Construction, Inc. and Warren Steen*, 14 FMSHRC 1125, 1131 (July 1992).

I conclude that both Richardson and Patterson were aware of the ongoing accumulation problem at the No. 3 belt V-scrapper, but failed to take measures to remedy the problem. Such inaction constituted a knowing authorization of the violation. Accordingly, I conclude that they are personally liable under section 110(c) of the Act.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed civil penalties of $3,600.00 for the company and $2,000.00 each for Richardson and Patterson. However, it is the judge=s independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC ____ (April 1996).

In connection with the six criteria, I note that the Stockton Mine (Portals #1 and #130) produced 999,068 tons of coal during the year prior to the violation and that Cannelton is a

subsidiary of Cyprus Amax Minerals Company which produced 65,385,647 tons of coal, making this a large mine. (Govt. Ex. 6.) The Assessed Violation History Report indicates that the Respondent=s history of previous violations is no more than moderate, although for the two years prior to the violation it had 47 violations of section 75.400. (Govt. Ex. 10.) The parties stipulated that payment of the maximum penalty that could be assessed in this case would not affect the company=s ability to remain in business and that the violation was abated in a timely and good faith manner.

On the other hand, the gravity of the violation was serious and it involved a high degree of negligence. Taking these six criteria into consideration, I conclude that the penalty proposed by the Secretary is appropriate in this case.

Gravity and negligence are the only elements the penalty criteria that can be applied to the case of an individual. However, I find it incongruous that a company the size of Cannelton should pay a penalty of $3,600.00, while an employee of the company is assessed a $2,000.00 penalty. Consequently, I conclude that a $500.00 should be assessed against both Richardson and Patterson.

ORDER

Citation No. 4195028 issued to Cannelton Industries, Inc. and the civil penalty petitions alleging that George Richardson and Charles Patterson knowingly authorized the violation in the citation are **AFFIRMED**. Accordingly, Cannelton Industries, Inc., George Richardson and Charles Patterson are **ORDERED TO PAY** civil penalties of **$3,600.00**, **$500.00** and **$500.00**, respectively, within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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